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THE CARRYING ON OF BUSINESS BY A FRATERNAL INSURANCE SOCIETY IN A STATE SO AS TO MAKE ITS CONTRACTS SUBJECT TO ITS LAW.

There can be no doubt, that as to an ordinary insurance company a contract between it and an individual, either for life or property insurance, is subject to general rule as to other contracts as to the law governing its construction or performance. But, is this so as to a contract, whereby one'e life or health or freedom from accident is provided for in what is known as an ordinary benefit certificate in a fraternal or assessment company? Decision in Eighth Circuit Court of Appeals, in effect, answers this question in the affirmative. Iowa State Traveling Men's Assn. v. Ruge, 242 Fed. 762.

That case ruled that where membership in such a society, incorporated in Iowa, was applied for by a resident in Missouri and accepted in Iowa, the contract was a Missouri contract and governed by its law as to the suicide clause therein.

While Missouri decision is cited in support of the ruling, yet it seems to us, that this may not be a case where this as a construction of local law is necessarily controlling. In other words, if Iowa law held to the contrary in such a case, there is no reason why it should give way to Missouri ruling. It rather is a question in which one may look for controlling principle in comity or in question of conflict of laws between different jurisdictions.

But, independently of all this, it seems to us, that there is an essential difference in a contract evidenced by a Benefit Certificate and that evidenced by an insurance policy *eo nomine.*

An insurance company, generally speaking, is organized for private gain; a fraternal society is created for a benevolent purpose. Acts by an insurance company are in a purely corporate capacity and their validity is circumscribed by charter powers or by way of estoppel bringing them within such powers. A fraternal organization, on the other hand, represents no one in a contractual way. When an applicant for membership is accepted, he becomes one of a classified number of individuals with rights and obligations *inter sese.*

This community has selected an agency as a clearing house arrangement for keeping track of membership. It cannot vary one iota the relation between the members. It can do nothing in the way of a representation in dealing with members that works an estoppel in their favor. When it speaks by an officer, he is merely the officer of members and not an agent of the clearing house arrangement, itself an agency between members.

Where, then, in essence is a contract made, when this agency sends to the member a benefit certificate? At most this would be but a memorandum between the member and his associates. His and their contract lie far back of what this agency says for him and them as its principals. The contract is in the sort of statement he makes when he joins as a member, assuming then correlative burdens and entitled to correlative rights with others. It is a sort of limited partnership in risk for prpspective benefit after dissolution, so far as he is concerned.

Where is such a partnership located? Why does it exist more particularly in a state where the clearing house agency lives and moves and has its being rather than elsewhere? It may be answered, that it is there because the law of that state prescribes how such an arrangement may be classed as a corporation and what kind of an aggregation of men it may represent.

But this, in essence, only means that such and such a body of men as united or proposed to be united, are for purposes not

opposed to any policy of the law of that state. It might even say, that, if such an aggregation consented among themselves for purposes defined by law, a certain construction should be placed on their acts as represented by the agency. But this is merely a permissive feature in that law. If you take advantage of it, your acts mean as between each other a certain thing. This, however, is a very different thing from attaching defined consequences to a corporate act as such.

It is not the policy of any state erecting a benevolent agency merely to localize relations between those back of the agency. Nor is it good law in any state to say that a principal or a number of principals residing in various states, are carried over to wherever their agent acts, so as to put upon their contracts a construction they never intended.

NOTES OF IMPORTANT DECISIONS.

INTERSTATE COMMERCE COMMISSION—EXCESS OF CHARGE CONCLUSIVE OF MEASURE OF DAMAGES IN SUIT FOR REPARATION.—In N. Y., N. H. & H. R. Co. v. Ballou & Wright, 242 Fed. 862, it was held by Ninth Circuit Court of Appeals, that evidence to show, that a dealer added to the cost of merchandise disposed of by him in retail sales, was incompetent in a suit by the dealer for reparation for excess freight paid to carrier.

The Court said: "Can petitioner be deprived of the reparation provided by law because in the petitioner's business the freight paid was entered as an element of cost and was passed along to the ultimate purchaser in the selling price?"

The statute provides that if a carrier does anything unlawful under the Commerce Act, "it shall be liable to the person or persons injured thereby for the full amount of damages sustained * * * together with a reasonable counsel or attorney's fee," etc. The purpose of the statute is to enforce reasonable rates between the carrier and its customer. But it does not go over the latter's head to inquire whether in disposing of an article to another he recoups his loss caused by overcharge.

There would seem to be no privity between the carrier and the ultimate purchaser, so as to make the amount of the overcharge a trust fund, held for such purchaser's benefit. Furthermore, as the purpose of the statute is to place, let us say, a merchant on the same level as others in trade, a sporadic case having a tendency to place him at a disadvantage with others in the market, cannot conclusively be said to have been met by his saving himself from its influence by reimbursing himself as to the overcharge. It is only incidental that he is able to do this. If his competitors have not been overcharged as to the same class of goods, special circumstances may have enabled him to guard against loss. Or he may feel that to retain his customers, he should make up to them what he has exacted to make himself whole. Or he may really feel that he has hurt his trade in making the overcharge to them which the carrier has wrongfully imposed on him. The rates the Commission has fixed being *prima facie* reasonable an overcharge to a customer of him who has paid an unlawful rate, seems to have no tendency towards showing it was lawful. It is a simple proposition to work out as between carrier and shipper. It involves very much of intricacy to extend it beyond these two.

CONTRACTS—ARCHITECT'S PLANS FOR BUILDING FORBIDDEN BY STATUTE.—Medoff v. Fisher, 101 Atl. 471, decided by Pennsylvania Supreme Court, regards a suit by an architect for preparation of plans and specifications for, and to supervise construction of, a building "to contain a moving picture theater, Russian and Turkish baths, stores and dwellings." Expert testimony was offered by defendants to show the plans contravened a statute forbidding the occupation of any such structure where the seating capacity was five hundred or less. This testimony was rejected and plaintiff had judgment in the trial court.

In reversing this ruling, the court said: "The principle that, since one may change his mind before the actual perpetration of a forbidden act, the mere intention to commit a wrong is no offense has no proper application under the circumstances at bar; for even though, after an erection of this building, the defendants might not have put it to any forbidden use, yet that fact does not change the status of the case so far as the plaintiff is concerned. The latter's position, therefore, is simply this: All men are supposed to know

the law, and, further, one holding himself out as an architect is particularly charged with knowledge of the statutory regulations and restrictions governing the erection and use of buildings; therefore we must assume both the plaintiff and defendants knew that the uses to which the latter contemplated putting the proposed structure were forbidden under a criminal penalty by the statutes of Pennsylvania. Thus, it may be seen, we have the plain case of three men, the defendants, intending to do a forbidden thing, employing a fourth, the plaintiff, to assist them in making plans to carry out their unlawful purpose—in other words, a combination which could be indicted as a criminal conspiracy. Of course, no contracts or engagements entered into under such circumstances will be enforced at law."

There is nothing in the statute forbidding the erection of the building as planned, but its occupation merely is prevented. Did the architect participate in the supposed intent to violate the law? No injunction could prevent the building being erected, and the only interest of the public was, not that a building capable of being occupied in a forbidden manner should not be constructed, but that it should not be occupied when constructed. It was claimed the plans were for a building, that the architect knew could not be used and, therefore, there was no consideration. But a consideration is a good consideration, when it contemplates the surrender by a promisee of something of value. It need not be that what is surrendered shall be of value to the promisor.

PHYSICIANS AND SURGEONS—LICENSE FOR MINGLING CORPOREAL AND SPIRITUAL REMEDIES IN THERAPEUTICS.—It must be conceded that it is easier to cure, if cure is possible, one whose mind is in accord with remedies to that end than were the fact otherwise. And spirituality inspiring hope or tending to induce resignation may help this accord. But is it so that a paid specialist or alleged specialist may join his formula of silent prayer and recondite medicinal remedy and not be subject to license as a practioner of medicine, where he is paid for his services? This was the question in People v. Vogelsang, 221 N. Y. 290, 116 N. E. 977. Defendant's conviction was sustained on a charge of practicing medicine without a license.

This case shows that defendant issued a pamphlet, on the cover of which he called himself a "specialist in all forms of chronic diseases." The pamphlet acclaims the virtue of his medicines and his testimony shows he proclaims himself "a therapeutic and spiritualist healer and dealer in patent medicines." He used a liniment compounded of angle worms, turpentine, sweet oil and benzine. While rubbing the body of a sick person with it, he indulged in silent prayer. This was his formula in all cases and he was paid for his ministrations.

Referring to a Christian Science case where the Court said that even then there was question of good faith to be submitted to the jury, it was stated: "But things were done by this defendant which no good faith could justify. He combined faith with patent medicine. If he invoked the power of the spirit, he did not forget to prescribe his drugs. 'It is beyond all question or dispute,' said Voltaire, 'that magic words and ceremonies are quite capable of most effectually destroying a whole flock of sheep, if the words be accompanied by a sufficient quantity of arsenic.' * * * The tenets to which the law accords freedom alike of practice and of profession, are not merely the tenets, but the religious tenets, of a church. * * * While the healer inculcates the faith of the church as a method of healing, he is immune. When he goes beyond that, puts his spiritual agencies aside and takes up the agencies of the flesh, his immunity ceases. He is then competing with physicians on their own ground, using the same instrumentalities, and arrogating to himself the right to pursue the same methods without the same training."

While we believe, as the Court does, that the conjoint use of spiritual and physical things to accomplish a cure, demonstrates to the average mind the presence of fake practice, still we think this does not necessarily show want of good faith in spiritual cure. If divine command really tells one to employ a formula of speech or to perform some physical act, in bringing about a miraculous cure, would he not do as the command specifies? Scripture records that when the Savior cured the blind man, "He spat on the ground and made clay of the spittle and He anointed the eyes of the blind man with the clay." But even then the man did not see, but only when, as directed, he went and washed in the pool of Siloam. St. John Ch., 9 v. 6 and 7. But he took no pay for his services. One judge dissented.

CONTRIBUTION BETWEEN JOINT WRONG-DOERS.

It is the general rule that all who actively engage in the commission of a tort, or who command, direct, encourage, or aid or abet its commission are jointly and severally liable therefor.[1] It is furthermore said to be a general rule, that there is no contribution allowed by law to joint tort-feasors. The early text-writers on the subject of torts announced this to be the rule without any qualifications or exceptions,[2] and it is frequently met with as dictum in the reported decisions.

This doctrine that no contribution is allowed by law to joint tort-feasors first found expression in the English courts in the leading case of Merryweather v. Nixan.[3] This case was decided in the year 1799, by Chief Justice Lord Kenyon, of the King's Bench. The decision is very brief. One Starkey brought suit in the York Assizes against Merryweather and Nixan to recover damages for a trespass on certain mill property of Starkey, and recovered judgmen for 840 pounds, sterling, and levied execution on the property of Merryweather and collected the entire amount therefrom.

Merryweather then brought suit against his co-trespasser for half the amount he was compelled to pay to Starkey, and the court entered a non-suit against Merryweather, who then appealed to the King's Bench for a rule on the lower court directing it to set aside the non-suit, and Lord Kenyon refused to grant the rule asked for on the ground that as the parties were joint tort-feasors no contribution could be allowed between them. This decision has been cited as authority for the rule referred to in most of the cases involving the question of contribution among joint wrong-doers, and in most of the text-books, and may, therefore, fairly be called the leading case on the subject. It has been frequently stated in the reported decisions of our own courts that the reason of the rule is based on the maxim that no man can make his own misconduct the basis of an action in his own favor. *Ex turpi causa non oritur actio;* or, as expressed by the civil law, *Nemo ex delicto consequi potest actionem.* So that while the application of the principle stated seems first to have been made by Lord Kenyon in the case referred to something more than a hundred years ago, the principle itself is as old as the common or the civil law. But the rule as announced in the case of Merryweather v. Nixan has been so often modified and qualified that an analysis of some of the cases afterwards decided in England, and particularly of our own courts, leads to the conclusion that the rule of the Merryweather case lacks in definition; in other words, it is the law when applied to a certain class of cases only.

One of the first modifications or limitations in the application of the rule was that the parties implicated must have been in *pari delicto,* otherwise contribution would be allowed. In the case of Lowell v. Boston & L. R. R.,[4] the court says:

"Our law, however, does not in every case disallow an action by one wrong-doer against another to recover damages incurred in consequence of their joint offense. The rule is, *in pari delicto potior est conditio defendentis.* If the parties are not equally criminal, the principal delinquent may be held responsible to his co-delinquent for damages incurred by their joint offense. In respect to offenses in which is involved any moral delinquency or turpitude all parties are deemed equally guilty and courts will not inquire into their relative guilt. But where the offense is merely

(1) Henry v. Carlton, 113 Ala. 636; Monat v. Wood, 22 Colo. 404; Northern Trust Co. v. Palmer, 171 Ill. 383; Cleveland v. Stillwell, 75 Ia. 466; Sharpe v. Williams, 41 Kan. 56; Bright v. Bell, 113 La. 1078; Martin v. Golden, 180 Mass. 549; Monson v. Rouse, 86 Mo. App. 97; Osborne Co. v. Pino Mfg. Co., 51 Neb. 502; Carson v. Dessau, 142 N. Y. 445; Stephens v. Smathers, 124 N. C. 571.

(2) Addison on Torts, Sec. 1394; Hilliard on Torts, 128.

(3) 8 T. R. 186.

(4) 23 Pick. (Mass.) 32.

malum prohibitum, and is in no respect immoral, it is not against the policy of the law to inquire into the relative delinquency of the parties, and to administer justice between them, although both parties are wrong-doers."

And in the case of Gray v. Boston Light Co.,[5] the court says:

"The second objection taken by the defendant is that the injury was caused by the negligence of the plaintiff and the defendant, and that they were joint tort-feasors, and that there cannot be contribution between them. When two parties acting together commit an illegal or wrongful act, the party who is held responsible in damages for the act cannot have indemnity or contribution from the other, because both are equally culpable or *particeps criminis*, and the damages result from their joint offense. This rule does not apply when one does the act, or creates the nuisance, and the other does not join therein, but is thereby exposed to liability, and suffers damage. He may recover from the party whose wrongful act has thus exposed him. In such case the parties are not in *pari delicto* as to each other, though as to third persons both are liable."

The same rule has been followed in other jurisdictions where the question has arisen.[6]

Another modification of the rule is that where there is not a known, meditated wrong, and the parties acted in good faith, the rule is held not to apply. Judge Cooley in his work on Torts, page 254, last edition says, "But there are some exceptions to the general rule which rest upon reasons at least as forcible as those which support the rule itself. They are cases where, although the law holds all the parties liable as wrong-doers to the injured, yet as between themselves some of them may not be wrong-doers at all, and the wrong may be entirely unintentional." In such cases the rule is held not to apply and contribution is allowed in proper cases.[7]

In the case of Jacobs v. Pollard,[8] in the line of what has just been stated, the court says:

"Justice and sound policy upon which this salutary rule is founded alike require that it should not be extended to cases where the parties have acted in good faith, without any unlawful design, or for the purpose of asserting a right in themselves or others, although they may have thereby infringed upon the legal rights of third persons. It is only when a person knows or must be presumed to know that his act was unlawful that the law will refuse to aid him in seeking an indemnity or contribution. It is the unlawful intention to violate another's rights, or a willful ignorance and disregard of those rights which deprives a party of the right to contribution. It has therefore been held that the rule of law that wrong-doers cannot have contribution between themselves or redress against each other is confined to those cases where the person claiming redress or contribution, knew, or must be presumed to have known, that the act for which he has been mulcted in damages was unlawful."

To the same effect is Judge Story's statement as to the application of the rule; he says, in his work on partnership, Sec. 20: "This rule is to be understood according to its true sense and meaning, which is, that where the tort is a known, meditated wrong, and not when the party is acting under the supposition of the innocence and propriety of the act, and the tort is one of construction and inference of law."

And this leads us to a consideration of another class of cases where the rule is held not to apply, namely where the alleged wrongs are those which arise by inference

(5) 114 Mass. 149, 19 Am. Rep. 324.

(6) Washington Gaslight Co. v. District Columbia, 161 U. S. 316; Union Stockyards Co. v. C., B. & Q. R. R., 196 U. S. 222; Vandiver v. Pollak, 97 Ala. 467; Cincinnati R. Co. v. Louisville R. Co., 97 Ky. 128; Churchill v. Holt, 127 Mass. 165; Minneapolis Mill Co. v. Wheeler, 31 Minn. 121.

(7) Moore v. Appleton, 26 Ala. 633; Bailey v. Bussing, 28 Conn. 455; Herr v. Barber, Dist. Col., 2 Mackey 556; Gower v. Emery, 18 Me. 79; Chesapeake Canal Co. v. Allegheny Co., 57 Md. 201; Jacobs v. Pollard, 10 Cush. (Mass.) 287; Smith v. Ayrault, 71 Mich. 475; Ankeny v. Moffitt, 37 Minn. 109; Iron Co. v. Rice, 179 Mo. 480; Bank v. Avery Planter Co., Neb., 95 N. W. R. 622; Nashua Iron Co. v. Worcester Co., 62 N. H. 159; Acheson v. Miller, 2 Ohio St. 205; Armstrong v. Clarion Co., 66 Pa. St. 220; Gulf, etc., Co. v. Galveston R. Co., 83 Tex. 515.

(8) Supra.

of law or construction of law, and are free from moral wrong or intentional wrong as to some of the parties, although they are wrong-doers as to the party injured. These cases arise by reason of the various legal relations, such as master and servant, principal and agent, common carriers, joint contractors and joint operators, partners, and other relations which will readily suggest themselves to the reader. Perhaps in this connection we cannot do better than quote from the opinion of the court in the case of Bailey v. Bussing.[9] This was an action for contribution on account of the plaintiff, Bussing, having been compelled to pay damages because of the negligent driving of one of the stage coaches whereby a party had been injured, the plaintiff, Bussing, being one of three joint owners in the stage line operating said stage coaches. Ellsworth, J., said:

"The reason assigned in the books for denying contribution among trespassers is, that no right of action can be based on a violation of the law,—that is, where the act is known to be such, or is apparently of that character. A guilty trespasser, it is said, cannot be allowed to appeal to the law for an indemnity, for he has placed himself without its pale by contemning it, and must ask in vain for its interposition in his behalf. If, however, he was innocent of an illegal purpose, ignorant of the nature of the act, which was apparently correct and proper, the rule will change with its reason, and he may then have an indemnity, or, as the case may be, a contribution, as a servant yielding obedience to the command of his master, or an agent to his principal, in what appears to be right, as an assistant rendering aid to the sheriff in the execution of the process, or common carriers to whom is committed and who innocently carry away property which has been stolen from the owner. We must look for personal participation, personal culpability, personal knowledge. If we do not find these circumstances, but perceive only a liability in the eye of the law growing out of a mere relation to the perpetrator of the wrong, the maxim of law that there is no contribution among wrong-doers is not applied. Indeed, we think this maxim too much broken in upon at this day to be called with propriety a rule of law, so many are the exceptions to it, as in the case of master and servant, principal and agent, partners, carriers and the like."

(9) Supra.

Not to extend this review beyond its proper limits attention may be directed briefly to a few instances of further modifications of or exceptions to the rule stated.

In the relation of partnership it is of course elementary law that each partner is the agent of all the partners in the transaction of the partnership business. It is likewise elementary that all the partners are liable for the tort of any one of the partners committed within the scope of the joint act of all the partners, then those not partnership business. If the tort is not the guilty of intentional wrong are only wrong-doers by construction of law, under the rules above cited, and if damages are recovered from them by reason of the wrong committed by a partner, who commits the wrong intentionally, they are not in *pari delicto* and such partner may have contribution.[10]

Another exception to the application of the rule arises from the relation of master and servant, as above stated, and the familiar maxim, *"Qui facit per alium facit per se"* applies. And this rule, no doubt, is a maxim derived from the doctrine of *respondeat superior,* and is said by all the authorities to be a rule of public policy; and the practical ground of the rule is that on the whole, substantial justice is best served by making a master responsible for the injuries caused by his servant acting in his service when set to work by him to prosecute his private ends with the expectation of deriving from the work of his servant a personal or private profit. The doctrine of *respondeat superior* is of course fundamental, and it is familiar law that the master is

(10) Austin v. Appling, 88 Ga. 44; Miller v. Phoenix Ins. Co., 109 Ill. App. 624; Hess v. Lowery, 122 Ind. 225, L. R. A. 7, p. 90; Taylor v. Thompson, 62 App. Div. 159, 70 N. Y. Supp. 997; Betts v. Gibbins, 2 A. & E. 57.

liable or responsible in law for the torts of his servant both of commission and omission, within the line of his duty or employment. But if the tort complained of was not committed under the direction or knowledge of the master, then in such case the wrong of the master is a wrong by construction of law only, and under the rule the master is not *pari delicto,* and if the master is mulcted in damages by reason of the intentional wrong of his servant the rule of no contribution does not apply, although both are liable to the party injured as joint wrong-doers.[11]

Under certain circumstances there is another exception to the rule in a class of cases that are rather peculiar in that the wrongs are those arising from the neglect of imposed duties under the statutes as to the duties of municipal corporations. Cities and incorporated towns in every state in the union are given by statute the control of the streets within their corporate limits; they are charged with the duty of constructing and maintaining them in safe condition for public travel, and are bound to exercise a reasonable degree of diligence and care to accomplish that end. A city or incorporated town may, however, impose the duty of constructing and keeping sidewalks in good repair and safe condition upon the adjoining property owners, but in such event the city or incorporated town, as the case may be, is not relieved from the duty imposed upon it by law, and if the adjoining property owner fails to keep his sidewalk in good repair and safe for public use and a person is injured by reason of a defect therein, the city and the property owner are both joint wrong-doers under the law and are jointly and severally liable to the person injured.[12]

In such case and in event that such city is compelled to pay damages to the party so injured by reason of the neglect of the property owner to maintain his sidewalk in safe condition for public use, it has been repeatedly held that the rule that there is no contribution allowed between joint wrong-doers does not apply and that the city may recover the entire amount from the owner of the property whose negligence was the proximate cause of the injury.[13]

The necessary brevity of this article precludes any reference to the various distinctions made by the courts in regard to torts of misfeasance and nonfeasance on the part of the servant, or as to the wrong-doer to his fellow-servant for injurious wrongs of misfeasance and nonfeasance.

In conclusion, we feel we may safely assume that the foregoing is, to some extent at least, a justification of the statement made by the court in Bailey v. Bussing, *supra,* that the rule that there is no contribution between joint tort-feasors is subject to so many exceptions that it cannot with propriety be called a rule of law at all. The principle of the decision in Merryweather v. Nixan, cited as the leading case on the proposition that there is no contribution between joint wrong-doers, has been applied with practical unanimity by the courts of England and America down to the present time in cases involving a similar state of facts, and it is this fact no doubt that has led to the indiscriminate dicta so often met with that there is no contribution among joint wrong-doers. It is true when limited to the proper class, but inaccurate and not true when stated to be the general rule.

O. C. BROWN.

Indianola, Iowa.

(11) Smith v. Foran, 43 Conn. 244; Georgia Southern R. R. Co. v. Jossey, 105 Ga. 271; Grand Trunk Ry. Co. v. Latham, 63 Me. 177; Costa v. Yochini, 104 La. 170; Memphis R. R. Co. v. Greer, 87 Tenn. 698; 2 Thompson Negligence 1061; Wharton on Negligence, Sec. 246.

(12) Davenport v. Ruckman, 37 N. Y. 568; Rowell v. Williams, 29 Iowa 210; Peoria v. Simpson, 110 Ill. 204; Papworth v. Milwaukee, 64 Wisc. 389.

(13) Westfield v. Mayo, 122 Mass. 100; Portland v. Atlantic, etc., 66 Me. 485; Minneapolis Mill Co. v. Wheeler, 31 Minn. 121; Western R. R. v. Atlanta, 74 Ga. 744; Chicago v. Robbins, 2 Black 418; Durant v. Palmer, 5 Dutcher 544.

CONCERNING THE DISRESPECT OF THE LAW.

If an evil is to be eradicated, its productive causes must first be found and an attempt made at their removal or at least at weakening them. Merely to fight conditions as they are, that is, the results of such causes, without finding the factors behind them, is a futile task. Many such attempts have failed. This is axiomatic.

Judge Martin J. Wade, of Iowa, proposes, as a remedy for the much lamentable disrespect of the law that is becoming so widespread, to introduce a course of study of the law in the elementary schools. Good and well! But will this remove the disrespect? I dare say it will not. And the reason is this: The trouble does not lie in a lack of knowledge of the law upon the part of the large masses of the people; rather is the trouble to be found in the experiences they receive in their daily life that the administration of the law (not the written law in the statute books) is two-sided. They feel, justly enough, that the rich can buy their freedom, while the poor cannot. It is idle for Judge Wade to say: "Should they not feel what a dignity is conferred upon the humblest whose cottage is his castle, sacred under constitutional guarantees from invasion, even from unwarranted search or seizure?" when every day people are arrested on suspicion, without warrants, locked up in jail "pending investigation of crimes". What reparation does the law offer to poor innocent people arrested on suspicion and after remaining in jail for weeks or months are released, but in the meantime having lost their jobs, their friends, their all?

Judge Wade pleads for "an opportunity for knowledge of the law for the 'submerged tenth,' the majority of whom never get through the high school". Permit me to ask in the name of what logic do the "submerged masses" need a knowledge of the law? Will it help them make a living? We still cling to our belief that what the masses need is more technical schools, where they may learn how to earn an honest livelihood, and thus the disrespect of the law may be given a far more deadlier blow than a knowledge of the law could administer.

But since Judge Wade has entirely ignored the causes of this disrespect of the law, permit me to point out one or more of them.

The power which the Supreme Court of the United States has arrogated to itself to annul legislation of the several states on the ground of unconstitutionality has brought about more disrespect of the law and the courts than anything I know of. Take the decision of Coppage v. Kansas.[1] By this decision, from which Justice Holmes, Day and Hughes dissented, the legislation of fifteen states which was passed for the benefit of the masses, that is the working classes, was annulled. Even John Marshall, who was the first to usurp this power, states in Marbury v. Madison that the conflict between the state and the Federal law must be so clear as to leave no doubt of their repugnancy, before it is to be declared unconstitutional. Now, can it be claimed that where state statutes have been approved by so many state courts, and where four or less Justices dissent, that the unconstitutionality of the state law is so clear? In Coppage v. Kansas the Supreme Court decided that states have no right to pass laws, making it a misdemeanor for any person or corporation "to coerce, require, demand or influence any person or persons to enter into any agreement, either written or verbal, not to join or become or remain a member of any labor organization or association, as a condition of such person or persons securing employment, or continuing in the employment * * * " Now, these various state legislatures found that many large corporations, such as the Frisco company involved in the

(1) 59 L. Ed. 441.

Coppage case, were trying to break up the labor unions; that such unions were necessary to the welfare of the working classes, and therefore they passed the law in question. In his dissenting opinion, Justice Holmes said: "In present conditions a workman not unnaturally may believe that only by belonging to a union can he secure a contract that shall be fair to him." But the majority opinion holds that the law in question interferes with the freedom of contract upon the part of the employers. To which Justice Day, also in a dissenting opinion, replies: "But liberty of making contracts is subject to conditions in the interest of the public welfare, and which shall prevail—principle or condition—cannot be defined by any precise and universal formula * * *. The burden is on him who attacks the legislation, and it is not sustained by declaring a liberty of contract. It can only be sustained by demonstrating that it conflicts with some constitutional restraint or that the public welfare is not subserved by the legislation. *The legislature is, in the first instance, the judge of what is necessary for the public welfare, and a judicial review of its judgment is limited.* (italics mine) The earnest conflict of serious opinion does not suffice to bring it within the range of judicial cognizance."

In the course of his argument in favor of the Kansas statute, Justice Day says: "Analogous case, viewed from the employer's standpoint, would be: Can the state, in the exercise of its legislative power, reach concerted effort of employees, intended to coerce the employer as a condition of hiring labor, that he shall engage in writing to give up his privilege of association with other employers in legal organizations * * * having for their object a united effort to promote by legal means that which employers believe to be for the best interest of their business?". It is this feeling of inequality, this discrimination between the rights of the "submerged tenth" and the captains of industry, in a word the unfairness in the administration of the law, that is so sharply brought out in Justice Day's hypothetical case, which causes the masses to become indifferent to the law, to question its justice, to lose respect for it. * * * For no one will doubt that such concerted action of any labor union as is pointed out in Justic Day's analogous case would be quickly and ruthlessly suppressed by suitable laws, and the Supreme Court would not find it a difficult task to uphold such legislation, by a unanimous court at that!

The same argument would be advanced to sustain such legislation in favor of the employer which has been used to defeat that in favor of the workmen, that is, liberty of contract! Are they not justified in feeling that the law, not as written but as construed and administered by the courts, is two-sided? What is food for one is poison for the other!

Another potent factor in creating disrespect of the law has been the way the Fourteenth Amendment has been seized upon by the plutocrats of this country as a weapon with which to kill whatever legislation is passed having for its object social reform. The case of Lochner v. N. Y.,[2] is a splendid illustration. As far back as 1897, the people of New York decided that it was against the public welfare, indeed against public morals, to allow bakers to work in enormously heated rooms for an excessive number of hours and so they passed a law limiting such labor to ten hours per day. The interests promptly attacked the law, but all the state courts upheld it. They knew the motives behind it. They knew it was necessary and beneficial to the public health. The Supreme Court of the United States, however, discovered that it was in conflict with the Fourteenth Amendment! It would have been a revelation to the men who passed that amendment to protect the Negro to find it construed as holding white men in slavery

(2) 198 U. S. 45.

by prohibiting legislatures from limiting the hours of labor, or forbidding insanitary and dangerous conditions. With sardonic irony they added that they did this because the bakers had a "right to contract".

Does Judge Wade believe that the "submerged tenth", if familiar with these decisions would have more respect for the law and the courts? Instead of bemoaning conditions, let us remove some of the causes creating the conditions. If the law is to be respected, the masses must be assured that laws passed for their benefit are not going to be set aside on some technical ground difficult even for the lawyer to comprehend! The greatest good to the greatest number should be the guiding principle in a democracy. And as long as the law and the courts jealously safeguard property rights more than human rights; as long as the interests of the many are subjected to the interests of the few, and as long as state legislation, aiming at the betterment, at the amelioration of the condition of the masses, is annulled by the Supreme Court of the United States by technical and intricate and perversive construction of the Fourteenth Amendment, etc., there can be no question of respect of the law. Conditions are never remedied unless their causes are first removed.

HARRY W. FREEMAN.

Houston, Texas.

CRIMINAL LAW—ARGUMENT.

STATE v. WRIGHT.

Supreme Court of Washington, July 20, 1917.

166 Pac. 645.

Remark of prosecuting attorney in argument that he fully believed defendant guilty, or he would not have brought the case to trial a second time, being provoked by, and in answer to insinuation of defendant's counsel that the case was not dismissed after disagreement because of the prosecuting attorney's lack of courage, is not error.

MOUNT, J. The appellant was convicted of the crime of carnally knowing a female child. He appeals from a sentence imposed upon him after a verdict of the jury. He makes two assignments of error: First, that the court erred in denying an application for a transfer of the cause to some other county for trial; and, second, for misconduct of the prosecuting attorney in his closing argument to the jury.

It appears that there had been a former trial of the case to the court and a jury. The jury, upon the former trial, disagreed, and was discharged by the court. In discharging the jury after their failure to agree, the court said to the jury:

"If a jury cannot convict under such evidence as was presented in this case then no 12-year-old girl in the county will be safe from attack. The evidence presented by the state, in my opinion, was entirely reliable, of a strength seldom heard in this court and of a character seldom presented in a case of this kind. It convinced me beyond doubt of the guilt of the defendant. It seems to me that this jury could not have taken its responsibilities in the same light as the court. A jury is a part of the court; its duties are just as weighty; and it should take its responsibilities with equal seriousness."

Subsequently a motion for a change of judges and for a change of venue was made by the appellant. This motion was supported by several affidavits to the effect that these statements of the court were published in a number of newspapers in the county which were generally read, and created a prejudice against the appellant. Several affidavits on behalf of the state were filed to the effect that no prejudice was created by the publication of these statements of the court, and that there was no general prejudice in the county against the appellant, and that he could have a fair trial. After the motion was made, the judge who tried the case the first time transferred the case to another department of the same county, and the judge to whom the case was transferred, after considering the affidavits, denied the motion.

It is argued by the appellant in support of his first contention that upon the showing thus made it was reversible error of the trial court to refuse a change of venue. The appellant relies upon the case of State v. Hillman, 42 Wash. 615, 85 Pac. 63. We think that case was a much stronger case than this. In the Hillman case a number of affidavits were filed which alleged that:

"There was an organization known as the 'Hillman Victim Association' composed of a large number of people, organized for the purpose of creating public sentiment against appellants, and particularly against appellant Hillman which said association by means of public meetings and individual efforts, and by mailing

postal cards reflecting upon the character of said Hillman, had done much to arouse prejudice against these appellants; * * *"

These affidavits were not controverted by the state, and apparently there was no counter showing. In that case we took the facts stated in the affidavits as being true, and for that reason held it was error in the trial court not to grant a change of venue. While it is no doubt true that the articles above mentioned were published in many of the papers in Pierce county, where the action was tried, it is disputed that there was any general sentiment against the appellant, and it was for the court then to exercise its sound judicial discretion and decide whether a change of venue should be granted to another county. In the case of State v. Welty, 65 Wash. 244, 118 Pac. 9, after referring to sections 2018 and 2019, Rem. & Bal. Code, with reference to a change of venue to some other county, we said:

"It is apparent from a reading of these sections that the granting or denying of the change of venue is a matter resting entirely in the sound judicial discretion of the trial judge. Such being the statute, the ruling of the trial court cannot be reversed upon appeal, unless the record contains some evidence of its gross abuse, or it is shown that the court's ruling was arbitrary. Such has been our holding whenever such a question has been before us,"—citing a number of cases.

And then, further on in the same opinion, we said:

"It must appear, before we would be justified in reviewing the trial court's ruling, that the community has been so warped by the passion and prejudice of the newspaper articles complained of that there is danger of the trial jury being so influenced by such publication as to give heed to them rather than to the evidence in reaching a verdict"—citing a number of cases.

We think this is a correct statement of the rule of law with reference to this assignment of error, and we think it does not appear that the court abused its discretion in denying the motion.

Upon the other assignment of error it appears that, when counsel for the defense was addressing the jury, he made a statement, saying:

"I say that these men after this man has once been tried and when one jury had already disagreed on the facts in this case, when one jury has already stood eleven to one for acquittal, these men come here."

Counsel was then interrupted by an objection from the prosecuting attorney, and the court remarked:

"Counsel should not refer to that. This jury knows nothing about that."

Counsel then resumed, saying:

"Well, it is in the record that the jury disagreed, and inasmuch as they did not have the courage to give this man his liberty and dismiss this matter, you owe it to the commonwealth to give this man his liberty and permit this child to be restored to the arms of her parents. * * * I want you to have the courage that the state's attorneys did not have in this case after what has transpired, and do the things that they should have done long ago."

When the prosecuting attorney came to reply, he said:

"Counsel says that we should not have brought this case this time, and my answer to that is this, that we fully believe the defendant guilty or we would not have brought him to trial here."

It is argued by the appellant that this statement of the prosecuting attorney constitutes reversible error, citing a number of cases from this court, among them being that of Rangenier v. Seattle Electric Co., 52 Wash. 401, 100 Pac. 842, and State v. Armstrong, 37 Wash. 51, 79 Pac. 490, where we said:

"It is no part of the duty of the advocate to obtrude his personal opinion upon the jury, either as to the veracity of a witness or the weight of the evidence."

And:

"While it is improper for a prosecuting attorney, in argument, to express his individual opinion that the accused is guilty, independent of the testimony in the case, he may nevertheless argue from the testimony that the accused is guilty, and that the testimony convinces him of that fact."

A number of other cases are cited to show that it is no part of the duty of the prosecuting attorney to indicate his personal opinion to the jury. The remark objected to was brought about by what had theretofore been said by counsel for the defense, in which the prosecuting attorney was charged with not having the courage to give the appellant his liberty. Counsel insinuated by this remark that the prosecuting attorney did not believe the appellant was guilty, but did not have the courage to dismiss the action. Thereupon the prosecuting attorney answered by saying that he fully believed the defendant guilty, or he would not have brought him to trial.

"Remarks of the prosecuting attorney which ordinarily would be improper are not ground for exception if they are provoked by defendant's counsel and are in reply to his statements." 12 Cyc. 582.

We are satisfied that this is the correct rule, and, since the remark of the prosecuting

attorney was called forth and provoked by remarks of counsel for the defense, the remark made was not error.

We find no error in the record, and the judgment is therefore affirmed.

NOTE.—*Retaliatory Statements in Argument by a Prosecuting Attorney.*—A syllabus decision by a Georgia court says: "The fact that the defendant's counsel violated the rules and made statements not based upon the evidence in the case would not authorize counsel for the state to do likewise. *Injuria non excusat injuriam,* or in homelier phrase, 'two wrongs do not make a right.'" Jones v. State, 14 Ga. App. 568, 81 S. E. 801.

This case refers to Bennett v. State, 86 Ga. 401, 12 S. E. 806, 12 L. R. A. 449, 22 Am. St. Rep. 465, which shows that state's counsel claimed that if defendant did not have a bad character he could have proved this and had not done so. Defendant's counsel had reiterated his conviction that defendant had a good character and said one of the state's witnesses would not have employed him for six years otherwise. The court said: "To hold that because counsel on one side violates a rule of court by making statements outside of the evidence the opposing counsel has the right to violate the rule in like manner, would be turning a court, where justice should be administered according to the rules of evidence and of law, into a town meeting. We could as well hold, that, if the prisoner's counsel introduces illegal evidence, the state's counsel can reply by introducing other illegal evidence."

In a well-written opinion there was a going outside of the record in a damage suit by defendant's counsel and when counsel for plaintiff replied to this in like manner he was stopped by objection, which objection was overruled upon the ground that defendant's counsel had provoked the allusion. It was said: "We think the court erred in permitting counsel for the plaintiff to proceed with his argument upon facts not in evidence, and having no proper bearing upon the questions in issue * * * although the course of remarks permitted might have seemed to be excused by the previous allusions of the defendant's counsel to considerations scarcely more pertinent and proper. No fault of the opposite counsel could justify a repetition of that fault by his opponent. Tucker v. Henniker, 41 N. H. 317."

Where counsel for defendants in a criminal case gave reasons in his view for defendants not taking the stand and counsel for the state proceeded to state his view as to why they had not, he was suffered over objection to proceed. It was said: "The presiding judge, in permitting such a course of argument, against the objection of defendants, and in ruling that the prosecuting attorney had a right to comment on the reasons which the defendants' counsel gave for their not going upon the stand and testifying in their behalf, and also to give the reasons which the government contended really existed for their not testifying, committed an error which was manifestly prejudicial to the defendants." Com. v. Scott, 123 Mass. 239.

In People v. Kramer, 117 Cal. 647, 49 Pac. 842, it is said that misconduct or abuse of privilege by defendant's attorney does not justify similar abuse by state's counsel. This case was cited with approval in People v. Cook, 148 Cal. 334, 83 Pac. 43.

But it has been said very often that mere retaliation does excuse. It seems to us, however, that this is too strong a statement the other way. It possibly ought to have some weight in a court's exercising its discretion to say whether misconduct of this kind has really been prejudicial. At bottom, however, one's right to a fair, unprejudiced decision of his rights ought not to be sacrificed by the conduct in court of his counsel. As the Georgia court observes, a trial in court is not like "a town meeting." C.

CORRESPONDENCE

PRIVATE RIGHTS AND GOVERNMENT CONTROL.

Editor, Central Law Journal:

I was very much interested in Mr. Sutherland's article on "Private Rights and Government Control" in your issue of September 7th.

I wish to suggest, however, that all this legislation which he criticises is evidence of a groping in the dark for a remedy for evils that past ill-considered legislation has produced. While we are all equal before the law, no man of sense would claim that we are created with equal abilities, equal talents. For many years the trend of all financial legislation was toward the accentuation of the powers of the able, who already had an advantage over their less gifted brethren. When corporations were first permitted in the various states, it required a strong showing of public necessity, or convenience, to induce a legislature to grant a charter, and it was admitted that the creation of a corporation was a public act which lent to the corporation power and privileges that were denied to mere individuals; in other words, that no corporation could exist except by the action of government. Gradually the request for powers urged by those whose financial interests and abilities could benefit thereby, became so numerous that legislatures were induced by general incorporation laws to grant these powers and privileges to any group of persons who wished to avail themselves of them, and then, and then only, did the people forget that the creation of a corporation is practically a donation of quasi governmental powers to the individuals who run the corporation.

The principle that the best governed are the least governed, may still be true, but the fact that small particles of governmental power

have been distributed broadcast among the financially able, the mentally acute, has brought about this curious lot of regulating statutes, that try to remedy the evils that ill-considered legislation, based upon the principle of homeopathy, *"Similia similibus curantur."*

In my humble opinion corporations should be allowed to exist only for a public purpose or convenience, not for private convenience. And when so created to be under governmental control as public institutions, and that the finances of such institutions should be as open to inspection as the finances of government. The objection, then, to government inspection of private business affairs would cease, as there would then be no corporations that were not considered justly subject to government inspection and control.

PAUL T. KREZ.

Sheboygan, Wis.

BOOK REVIEW.

WOOD ON MODERN BUSINESS CORPORATIONS—SECOND EDITION.

This is the second edition of a work, under the above title, by Mr. William Allen Wood, L. I. M., of Indianapolis Bar, the first edition appearing in 1906.

This is a work essentially practical in its purpose. To be this it is necessary that it be founded on correct legal conception and that it appeal to the professional as well as the lay mind. It is more difficult to select and state necessary principles to attain this end, than it may be to delve into precedents and unfold the history of the law. Especially is this true of such a subject as corporations.

While it is interesting to go into this vaster field, yet, the author's purpose does not demand this. Elimination not too rigid and concreteness in setting forth what is necessary to be known by the counsellor of business men and easy reference by themselves to such things are the evident aims of the author. The things stated are more reminders for the former and checks upon the latter than anything else. This book helps to put the two on a better understanding of each other.

The forms in this book are quite full, and usefully suggestive. The work, as a manual, is quite complete. The first edition has been much appreciated in the business, and second is an enlargement as to useful subjects.

The volume is well executed typographically, is on good paper, with durable binding in red cloth, is of more than five hundred pages and comes from the publishing house of the Bobbs-Merrill Company, Indianapolis, 1917.

HUMOR OF THE LAW.

A witness in describing an event, said:

"The person I saw at the head of the stairs was a man with one eye named Wilkins."

"What was the name of the other eye?" spitefully asked the opposing counsel.—Collegiate Lawyer.

"Did you ever dream of being a pirate when you were a boy?"

"Oh, yes. Isn't it queer? Now I'm in the prosaic profession of law."

"Umph! You didn't miss it so far."

Out at the front two regiments, returning to the trenches, says Answers, chanced to meet. There was the usual exchange of wit.

"When's the bloomin' war goin' to end?" asked one north-country lad.

"Dunno," replied one of the south-shires. "We've planted some daffydils in front of our trench."

"Bloomin' optimists!" snorted the man from the north. "We've planted acorns!"—Current Opinion.

Carefully the burglar effected an entrance into the bank. He found the way to the strong room. When the light from his lantern fell on the door he saw the sign:

"Save your dynamite. This safe is not locked. Turn the knob and open."

For a moment he ruminated.

"Anyhow, there's no harm in trying it, if it is really unlocked."

He grasped the knob and turned.

Instantly the office was flooded with light, an alarm bell rang loudly, an electric shock rendered him helpless, while a door in the wall opened and a bulldog rushed out and seized him.

"I know what's wrong with me," he sighed an hour later, when the cell door closed upon him. "I've too much faith in human nature—I'm too trusting."—Rochester Evening Times.

WEEKLY DIGEST

Weekly Digest of ALL the Important Opinions of ALL the State and Territorial Courts of Last Resort and of ALL the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co. St. Paul, Minn

1. **Accord and Satisfaction**—Receipt.—Instrument reciting "Received of * * * cash in hand paid me (or us) and hereby agree to drop all charges which we might claim against him to date," was accord and satisfaction and not receipt.—Breining v. Lippincott, Ark., 196 S. W. 795.

2. **Alteration of Instruments**—Materiality. —Where it appears that words, "service of notice and protest is hereby waived," were interlined after execution of note, it is void as against the prior indorser, who did not assent to such alteration as it is a material alteration within meaning of Negotiable Instruments Law, § 124. —Stanford v. Stanford, N. J., 101 Atl. 388.

3. **Attorney and Client**—Employment.—Defendant, who had reason to believe that his attorney might have to employ other counsel, and made no objection to employment of plaintiff after knowledge thereof, held liable for reasonable fee.—Rowell v. Ross, Conn., 101 Atl. 333.

4. **Bailment**—Negligence.—Defendant is not liable for death of plaintiff's intestate, caused by sinking of boat hired of it, for failure to furnish boat which, when capsized, would float, supporting in water four clinging passengers, as defendant did not undertake to furnish nonsinkable boat.—Clark v. Detroit & M. Ry. Co., Mich., 163 N. W. 964.

5. **Bankruptcy**—Bulk Sales Act.—Under the Washington Sales in Bulk Act and Bankruptcy Act, § 70, pars. 4, 5 and § 67e, trustee held entitled to purchase price of stock of goods sold in bulk as against creditors named in the list furnished the purchaser by the vendor.—In re Thompson, U. S. D. C., 242 Fed. 602.

6.——Concealment of Assets.—Bankrupt, when sentenced for concealing assets, held not in contempt for failing to comply with order to turn over assets, served only a few minutes before, and hence court could not punish him for contempt.—In re Sobol, U. S. C. C. A., 242 Fed. 487.

7.——Discretion.—Where jury trial was not demanded in bankrupt's answer, held, that denial of demand, made on the next court day but one, was not an abuse of discretion.—In re Wester, U. S. C. A., 242 Fed. 465.

8.——Exceptions.—Where party merely excepted to the conclusions and order of the referee, without petitioning for review, held, that the matter was not formally before the court. —In re Zartman, U. S. D. C., 242 Fed. 595.

9.——Fraudulent Conveyance.—Conveyance of property by bankrupt to his mother and sister for an agreed amount, which was its fair value and which was credited on a valid debt, held not fraudulent.—Watson v. Adams, U. S. C. C. A., 242 Fed. 441.

10.——Preference.—Where bankrupt conveyed land as security by deed which was not recorded, and within four months before bankruptcy conveyed other land upon surrender of the unrecorded deed and notes evidencing indebtedness, held, that there was no preference. —Marsh v. Leseman, U. S. C. C. A., 242 Fed. 484.

11.——Proxies in Voting.—Proxies solicited by a creditor held properly voted, it not appearing that they were obtained in the bankrupt's interest, or that the holders of the proxies were subject to the bankrupt's control.—In re Callahan, U. S. C. C. A., 242 Fed. 479.

12.——Receiver.—Where bankrupt's assets exceeded the amount of admitted lien debts, and a further alleged lien debt was in dispute, held, that court erred in ordering property returned to state court receiver for administation in state cout.—Union Electric Co. v. Hubbard, U. S. C. C. A., 242 Fed. 248.

13.——Unincorporated Company.—Proceeding in bankruptcy may be brought against unincorporated company in its own name, though it is not a legal entity, nor suable as a company. —In re Order of Sparta, U. S. C. C. A., 242 Fed. 235.

14. **Banks and Banking**—Depositor.—Bank succeeding another bank and assuming its debts and liabilities had no right as against a depositor to pay his obligation as surety on an appeal bond in suit against the first bank and charge it to depositor.—Krueger v. First State Bank of Bowbells, N. D., 163 N. W. 817.

15.——Directors.—Where a statute places banking corporations under care of boards of directors, the corresponding duties and liabilities, in the absence of any statute, must be ascertained and controlled by common-law rules applicable generally to such relations and powers.—Bank of Commerce v. Goolsby, Ark., 196 S. W. 803.

16.——Evidence.—In the prosecution of a state bank president for unlawfully becoming indebted to the bank by being a member of a partnership which borrowed money from the bank in the name of two others, it was error to admit evidence of transactions after the al-

leged offense tending to show a partnership at that time.—Le Masters v. State, Tex., 196 S. W. 829.

17. **Bills and Notes**—Liability.—Under Code 1907, § 4973, where stockholder of bank delivered note which she signed, payable to bank conditionally on all other stockholders paying sums proportionate to share values, and all others did not contribute as condition contemplated, stockholder signing note was not liable, unless holder was holder in due course.—Bank of Tallassee v. Jordan, Ala., 75 So. 930.

18.——Pleading and Practice.—Where plaintiff suing on notes does not allege place of payment, and defendant does not question declaration, there is no fatal variance between it and the notes attached thereto, as required by Gen. St. 1906, § 1449, par. 2, so that offer of notes cannot surprise defendant.—Caldwell v. People's Bank of Sanford, Fla., 75 So. 848.

19.——Recitals.—Recital in note that it was one of series given for stock in company, did not give purchaser notice of any defenses that could be urged against original payees.—Commercial Guaranty State Bank v. Crews, Tex., 196 S. W. 901.

20. **Cancellation of Instruments**—Equity.—That mortgage sought to be canceled was fully paid, and that mortgagor could have given notice to mortgagees to cancel mortgage of record, and on their failure so to do recover penalty, did not exclude all equitable relief.—Trotter Bros. v. Downs, Ala., 75 So. 906.

21.——Equity.—A court of chancery has jurisdiction of a bill to restrain taking of note into another state, and its use therein in action on such note on the ground of fraud and for its cancellation of such note, though both parties are non-residents of the state, the note being impounded in this state in the hands of a Supreme Court Commissioner.—Stanford v. Stanford, N. J., 101 Atl. 388.

22. **Carriers of Goods**—Acceptance.—The consignee is obliged to accept goods when duly tendered by carrier, although damaged in transportation, if not rendered totally valueless.—Houston & T. C. Ry. Co. v. Iversen, Tex., 96 S. W. 908.

23. **Carriers of Passengers**—Alighting.—In action against street railroad for injuries to passenger attempting to leave car when handhold broke, evidence that plaintiff was accustomed to jump off car at particular point held inadmissible; there having been eyewitnesses.—Montgomery Light & Traction Co. v. Devinney, Ala., 75 So. 883.

24.——Evidence.—Evidence that passenger was intoxicated to knowledge of street car conductor, that he had repeatedly insulted a woman passenger, and immediately after the last insulting remark, struck her twice without protest by conductor, who was present, held to warrant finding that with proper care on part of conductor, assault might have been prevented.—Hoff v. Public Service Ry. Co., N. J., 101 Atl. 404.

25. **Chattel Mortgages**—Pleading and Practice.—Under Code 1907, § 3791, in detinue, plaintiff claiming under mortgage executed by defendant, defendant could plead breach of warranty by plaintiff as to soundness of property, price of which constituted consideration of mortgage.—Hood v. Jenkins, Ala., 75 So. 871.

26. **Commerce**—License.—A salesman of a non-resident manufacturer of aluminum ware, soliciting orders from house to house by sample for future delivery by interstate transportation, is not subject to a peddler's license, as this would be an interference with interstate commerce.—People v. White, Mich., 163 N. W. 971.

27. **Common Carriers**—Railroads.—One-twentieth of amount expended by owner of railroad in its construction cannot be charged against annual operating revenue in determining whether rates under state authority are confiscatory.—Darnell v. Edwards, U. S. S. C., 37 S. Ct. 701.

28. **Conspiracy**—Evidence.—In action by sign advertising company against other such companies for maliciously conspiring to mutilate plaintiff's signs, evidence that three of defendants, more than seven years before acts complained of, had been sued by another for like acts, was improperly received.—O. J. Gude Co., New York v. Newark Sign Co., N. J., 101 Atl. 392.

29. **Contracts**—Consideration.—It is a defense to action on note that it was given in consideration of payee's promise not to prosecute maker's brother for embezzlement.—People's Bank & Trust Co. v. Floyd, Ala., 75 So. 940.

30. **Corporations**—Executors and Administrators.—Where administrator's decedent contracted to pay $20,000 for stock which was entirely worthless, corporation being wholly without assets, administrator, in suit on decedent's agreement, could defend successfully for lack of consideration.—Lindsay v. Sonora Gold Min. & Mill. Co., Mo., 196 S. W. 764.

31.——Interstate Commerce.—Foreign corporation having no place of business in state does not, by making contract to deliver there iron pipe manufactured by it outside, but to be used there in performing contract of vendee with city, do business in state without license, where it performs its contract by delivering on cars material which would meet tests required by city's contract.—City of St. Louis v. Parker-Washington Co., Mo., 196 S. W. 767.

32.——Liability of Officer.—Where new manager of company, to protect memory of deceased manager, who had been kiting notes, used proceeds of sale of sample goods to extinguish notes, which were company liabilities, he could not be personally charged by company because his bookkeeping or want of bookkeeping left him open to suspicion.—Holland Furniture Co. v. Knooihuizen, Mich., 163 N. W. 884.

33.——Unpaid Stock.—Obligation of holders of unpaid stock in corporation, issued as full paid, is to pay so much of what is unpaid on stock as will satisfy claims of corporate creditors and meet winding up expenses.—McDermott v. Woodhouse, N. J., 101 Atl. 375.

34. **Damges**—Measure of.—Where municipal authorities trespassed on land to remove soil, the owner can recover the value of the soil taken away or the diminished value of the land, but he cannot recover both elements of damages.—City of Atlanta v. Swiney, Ga., 93 S. E. 24.

35.——Measure of.—In action for breach of contract under which plaintiff was to be employed by defendants, amount of his weekly salary was matter for jury to consider in arriving at his damages.—Babayan v. Reed, Pa., 101 Atl. 339.

36. **Dedication**—Loss of Title.—After a valid dedication a city could not lose title because a portion of the strip was included in an addition subsequently laid out by one of the signatories. City of Hardin v. Ferguson, Mo., 196 S. W. 746.

37.——Statutory.—Provisions for statutory dedications do not restrict the common-law power of an owner to devote his land or easements therein to the public use.—City of Hardin v. Ferguson, Mo., 196 S. W. 746.

38. **Divorce**—Custodia Legis.—Execution of writ of sequestration in wife's divorce suit places in custodia legis defendant's property to satisfy wife's claims for alimony to time of issuance of writ and subsequently accruing, and no rights can be acquired in property except subject to writ's operation.—De Lukacsevics v. De Lukacsevic, N. J., 101 Atl. 407.

39. **Easements**—Prescription.—To establish a right by prescription three things must be proven: (1) The continued and uninterrupted use of the right for 20 years; (2) the identity of the thing enjoyed; and (3) that the use was adverse or under claim of right.—Williamson v. Abbott, S. C., 93 S. E. 15.

40. **Election of Remedies**—Statute of Limitations.—Where one injured through the malpractice of a surgeon sued in tort, there was an election of remedies which barred a subsequent suit based on the contractual relation between the parties, even though action on the tort were barred by limitations at the time it was commenced.—Stokes v. Wright, Ga., 93 S. E. 27.

41. **Eminent Domain**—Damages.—Though condemnation of right-of-way, by Code 1907, § 3882, vests in applicant easement proposed to be acquired for purposes stated in application, and for no others, thus leaving fee in owner, in ordinary case of application to condemn easement, not limited to term of years, rule is to award owner value of entire fee at time of taking.—Ensign Yellow Pine Co. v. Hohenberf, Ala., 75 So. 897.

42.——Easement.—Where railroad condemned easement of lands for right-of-way and afterwards abandoned it, the title thereto reverted to original grantee, and was subject to condemnation for same purpose by another railway.—Canadian River R. Co. v. Wichita Falls & N. W. Ry. Co., Okla., 166 Pac. 163.

43. **Equity**—Decree.—Decree for bank stockholders against directors upon contingency that each pay decrees rendered against them, respectively, in favor of bank, held without authority and void.—Bank of Commerce v. Goolsby, Ark., 196 S. W. 803.

44.——Multifariousness.—Bill by assignee of mortgage against mortgagors and against devisee of his attorney, who bid in at foreclosure, took foreclosure deed, and prevailed in ejectment as against mortgagors, held not multifarious.—Wilson v. Henderson, Ala., 75 So. 935.

45. **Executors and Administrators**—Costs.—Commissions earned by an administrator are regarded as costs, and not as a portion of distributive share of heir who is also administrator of estate; hence administrator's application of commissions to his personal use does not work inequality in distribution.—Lester v. Toole, Ga., 93 S. E. 55.

46.——Personal Trust.—Will directing executor named to pay sufficient amount each year to wife and children for maintenance, and authorizing him to keep estate intact for 20 years, reposed in executor personal trust, and on his death duty devolved upon administrator with will annexed, and not upon executor's administrator.—Ralls v. Johnson, Ala., 75 So. 926.

47. **Food**—Constitutional Law.—Agricultural Law, §§ 52, 55, 57, prohibiting any person from buying milk to ship to a city for consumption or for manufacture into butter, etc., unless business is regularly transacted at a station within state and such person duly licensed, is unconstitutional.—People ex rel. Levy Dairy Co. v. Wilson, N. Y., 166 N. Y. S. 211.

48. **Fraud**—Misrepresentation.—The opinion or unauthorized statement of a corporation's agent as to legal effect of writing which defendant signed in purchasing mortgaged property, was not a fraudulent representation by the company.—Wiebke v. De Wyngaert, N. J., 101 Atl. 410.

49. **Garnishment**—Indebtedness.—Where garnishee contracted with defendant that he should receive at end of current year a percentage on all seed sold by him for garnishees, and that he should be paid nothing until expiration of year, garnishees were not, prior to that time, in any way indebted to defendant.—McKay v. Rowland & Co., Ga., 93 S. E. 36.

50. **Gas**—Public Service Commission.—The requirements of a uniform system of keeping accounts for all gas corporations, prescribed by Public Service Commission under authority of Public Service Law, § 66, have force of law.—People ex rel. Kings County Lighting Co. v. Straus, N. Y., 166 N. Y. S. 196.

51. **Guardian and Ward**—Collateral Inheritance Tax.—Where the purchaser in order to perfect his title was compelled to pay the collateral inheritance tax on the vendor's interest in the estate of a decedent, he could not recover the amount from the guardian of the minor grantors.—Jackson v. Myers, Pa., 101 Atl. 341.

52. **Injunction**—Irreparable Injury.—When title to land is in dispute, and trespasses are continuous and cause irreparable injury, equity will award temporary injunction, whether defendant or complainant is in possession, to enable parties to bring suit at law to establish legal title.—Mobile County v. Knapp, Ala., 75 So. 881.

53.——Public Lands.—Giving effect to unauthorized demand by Secretary of the Interior under Act June 25, 1910, that grantee in railway land grant should make advance deposit of cost of surveying township within grant, may be enjoined, where statute contemplates that when demand is not complied with rights in granted land shall cease, where there are millions of acres of unsurveyed lands within primary limits of such grants.—Santa Fe Pac. R. Co. v. Lane, U. S. S. C., 37 S. Ct. 714.

54. **Insurance**—Accident.—In action on accident policy, as platform of a subway station is

not a public conveyance, it was error to permit recovery of double indemnity upon theory that injury was sustained by insured "while in or on a public conveyance, including the platform, steps, or running board thereof, provided by a public carrier for passenger service."—Weil v. Globe Indemnity Co., N. Y., 166 N. Y. S. 225.

55.——Adjustment of Loss.—The promise of an adjusting agent to pay the loss under insurance contract breached by insured is not binding on insurer where agent was without authority to waive stipulations of policy.—Farmers' Mut. Fire Ass'n v. Steed, Ga., 93 S. E. 75.

56.——Condition Precedent.—Petition failing to allege that first payment of first premium had ever been made, which, under policy, was condition precedent to its effect, stated no cause of action, and was insufficient as against a general demurrer.—Boyd v. Southern States Life Ins. Co., Ga., 93 S. E. 42.

57.——Endowment' Policy.—Note given for premium due at commencement of 10-year endowment policy must be paid when due to render policy effective, or time of payment must be properly extended.—Selman v. Manhattan Life Ins. Co., Ga., 93 S. E. 60.

58.——Evidence.—Evidence in insurer's action to reform certificate of marine insurance on "coal" by substituting words, "coal, including freight," as intended, on ground of mistake in assumption that freight insured had actually been paid, in view of non-disclosure of contrary fact, held to require cancellation of certificate.—Cox v. C. G. Blake Co., N. Y., 166 N. Y. S. 294.

59.——Indemnity.—Where automobile accident policy did not preclude settlement by owner for excess liability, held that he had right to protect himself with respect to such liability without consulting defendant, and defendant's withholding of consent, either in good or bad faith, was immaterial.—McAleenan v. Massachusetts Bonding & Ins. Co., N. Y., 166 N. Y. S. 184.

60.——Instructions.—Where there was evidence that insured had suffered from disease for two or three years, held that it was not error to instruct that the fact, if it be a fact, that he had rheumatism and Bright's disease when making the application, would not preclude recovery if defendant's agent knew insured was physically and mentally ill.—Mutual Aid Union v. Blacknall, Ark., 196 S. W. 792.

61.——Insurable Interest.—Where record title to homestead is in husband, wife, residing with him and occupying property as homestead of both, has an insurable interest in buildings situated thereon.—State Mut. Ins. Co. v. Green, Okla., 166 Pac. 105.

62.——Knowledge of Agent.—Where the agent of the insurer knew when the policy was issued that the premises were vacant, and they were consumed by fire while vacant, though they had been occupied in the interim between the issuance of the policy and the loss, the company was liable.—Gordon v. St. Paul Fire & Marine Ins. Co., Mich., 163 N. W. 956.

63.——Promoters.—Agreement between promoters of insurance company, two officers in company to be taken over, agreeing to elect themselves as three of directors and officers of new company, held not fraudulent so as to vitiate contract of employment of one of their number with new company.—Puller v. Royal Casualty Co., Mo., 196 S. W. 755.

64.——Waiver.—Provision in fire policy requiring insurer to give written notice and tender return premium before cancellation was for benefit of insured, and could be waived by him.—Kelsea v. Phoenix Ins. Co., N. H. 101 Atl. 362.

65. **Intoxicating Liquors**—Local Option.—In prosecution for selling liquor in local option territory, held that, as election adopting local option was void, defendant could attack its validity, although statute provided a method for contesting such election.—State ex rel. Edwards v. Ellison, Mo., 196 S. W. 751.

66. **Licenses**—Chauffeurs.—Under Motor Vehicle Law, § 289, subd. 4, defendant telephone repairer, while using automobile furnished him by employer to convey himself and necessary materials from place to place, held not a chauffeur.—People v. Dennis, N. Y., 166 N. Y. S. 318.

67.——Unregistered Automobile.—Failure of owner and driver of automobile to renew his state license does not preclude a recovery of damages for negligence of defendant, which caused death of an occupant.—Chambers v. Minneapolis, St. P. & S. S. M. Ry. Co., N. D., 163 N. W. 824.

68. **Mandamus**—Admissions in Pleading.—Averments of alternative writ of mandamus are admitted by demurrer thereto.—Schwarzrock v. Board of Education of Bayonne, N. J., 101 Atl. 394.

69. **Master and Servant**—Course of Employment.—Where a gamekeeper was accidentally shot while aiding defendant's lessee in hunting a deer by express orders of defendant's superintendent, the accident arose out of the employment.—O. L. Shafter Estate Co. v. Industrial Accident Commission of California, Cal., 166 Pac. 24.

70. **Mechanics' Liens**—Materialman. — That the original contractors abandoned their contract before completion did not preclude a materialman from having and enforcing a lien created by the filing of a stop notice against the fund in the owner's hands, which constituted the difference between the sum paid the original contractors and the value of the work and material which the contractors had furnished.—Stettin v. Wilson, Cal., 166 Pac. 6.

71. **Mortgages**—Foreclosure. — Where sale under foreclosure of two separate tracts of land in different counties was confirmed, proceedings as to land in county other than that in which action was brought was void.—Union Cent. Life Ins. Co. v. Harney, Kan., 166 Pac. 233.

72. **Municipal Corporations**—Assessment. — Delay of municipal authorities in questioning assessment made by second municipality on pipe line belonging to first munipicality will not prevent subsequent attack on such assessment.—Jersey City v. Huber, N. J., 101 Atl. 378.

73.——Trespass.—Where authorities of a city are clothed with power to grade its streets and without authority take soil from the property of a private citizen, the city is liable for the trespass.—City of Atlanta v. Swiney, Ga., 93 S. E. 24.

74. **Navigable Waters**—Test.—Lake averaging four feet in depth from which fish are taken and which is capable of use for floating logs or light draft boats is navigable capacity, and not use being determinative.—Welder v. State, Tex., 196 S. W. 868.

75. **Negligence**—Attractive Lures. — Heavy two-wheeled freight truck about depot is not itself so attractive as plaything and so dangerous in its nature as to come within turntable cases and make railroad liable for leaving it accessible to child injured thereby.—Seaboard Air Line Ry. v. Young, Ga., 93 S. E. 29.

76.——Contributory Negligence.—If declaration in action for negligence where damages are not apportionable under statute shows on its face that plaintiff was guilty of contributory negligence, it is demurrable.—Groover v. Hammond, Fla., 75 So. 857.

77.——Defective Appliances.—Where servant, employed by drayage company, was injured by defective appliances furnished by employer, but

used by railroad in unloading materials for employer, railroad was not liable.—Purcell v. Delaware, L. & W. R. Co., N. Y., 166 N. Y. S. 279.

78. **Partnership** — Banks and Banking. — Transactions involved in loans negotiated by a bank cashier by which a pawnbroker loaned small amounts to different people, taking their notes, payable to a third person, and discounting these notes to bank with understanding that bank was to have one-half of the amount charged for loans, virtually put bank in partnership with pawnbroker.—Bank of Commerce v. Goolsby, Ark., 196 S. W. 803.

79.——Implied Agreement.—Generally, in absence of agreement, partner is not entitled to compensation while on partnership business, but where one partner is intrusted with management of business, and at instance of his copartners devotes his entire time to it, law implies agreement to pay active managing partner compensation.—Rains v. Weiler, Kan., 166 Pac. 235.

80.——Test.—A partnership for purpose of raising a crop of hops does not exist between two men where one of them has exclusive authority to sell the crop, the principal property of the concern.—John Gong v. Ton Toy, Ore., 166 Pac. 50.

81. **Physicians and Surgeons**—Malpractice.—Action for malpractice may have basis in willful injury, injury occasioned by negligence, or in doing of that which is forbidden by positive law, sounding in tort in every instance.—In re Pillsbury's Estate, Cal., 166 Pac. 11.

82. **Railroads**—Description of Land.—In suit against railroad company for services for construction of roadbed, wherein it was sought to foreclose lien on railroad's property, allegation that all property was subject to lien, in the absence of an exception, held sufficient description.—San Antonio, U. & G. R. Co. v. Hales, Tex., 196 S. W. 903.

83.——Ordinary Care.—Want of ordinary care on part of one riding with another in his automobile as mere guest would be measured by whether he failed in his duty to keep a lookout and warn his companion operating automobile when he discovered approach of train at crossing.—Lyon v. Phillips, Tex., 196 S. W. 995.

84. **Receivers**—Sale on Condition. — Sale of railroad in receiver's hands being for the benefit of creditors, cannot be required to be on condition that it be operated, though communities through which it passes contributed for its construction and equipment.—Union Trust Co. of Indianapolis v. Curtis, Ind., 116 N. E. 916.

85. **Reformation of Instruments**—Laches.—In suit by assignee of mortgage against mortgagors, in absence of appropriate assertion by complainant, cross-respondent, of defensive matter of laches, relief to defendant mortgagors, by reformation, could not be soundly denied them on ground of laches.—Wilson v. Henderson, Ala., 75 So. 935.

86. **Sales**—Breach of Contract.—In action for breach of contract to ship good pickings examined by plaintiff's agent in defendant's warehouse, plaintiffs could recover, if they did not know condition of goods at time they paid for them, and had no opportunity of inspection, even though they knew that some of the bales shipped were not those inspected at warehouse, but relied on defendant's representations that they were good, and rejected such goods as soon as they knew their condition and demanded reimbursement.—Robinson v. S. Samuels & Co., Tex., 196 S. W. 893.

87.——Breach of Warranty.—Relative to damages for breach of warranty of quality of ammonia sold for ice machines, it is unnecessary to show which of the several shipments was defective, all being sold to be mixed, and known that one impure lot would make the whole impure, decreasing its value and producing the same damages as if all had been impure.—Grasselli Chemical Co. v. City Ice Co., Ala., 75 So. 920.

88.——Consideration.—Modification of contract of sale, by merely remitting part of the price, is without consideration; mutual assent not being enough.—Montgomery County v. New Farley Nat. Bank, Ala., 75 So. 918.

89.——Misrepresentations.—If purchaser of stock feed believed it to be unsound, after calling seller's attention to the matter, buyer could rely on his representations.—Kincannon & Gaines v. Independent Cotton Oil Co., Tex., 196 S. W. 878.

90. **Schools and School Districts**—Site for School House.—The matter of site of a school house rests with the township trustee and the school authorities, to the exclusion of the township advisory board, subject to its establishment on township property.—Steiger v. State, Ind., 116 N. E. 913.

91. **Street Railroad**—Look and Listen.—Duty of stopping, looking and listening at railroad crossings, held not to apply to street railroads, and duty of pedestrians and vehicles is reasonable care and is no greater than that of company, except that as car is on tracks, vehicles and pedestrians must give way to clear its passage.—Runnels v. United Railroads of San Francisco, Cal., 166 Pac. 18.

92.——Res Ipsa Loquitur.—In action against street railway for personal injury from fall of trolley pole, where plaintiff might show how the accident happened by circumstantial evidence, the accident was not itself evidence of negligence.—Dougherty v. Philadelphia Rapid Transit Co., Pa., 101 Atl. 344.

93. **Taxation**—Gross Earnings.—Where ordinance of city of Mobile stated that per cent of gross receipts of street railroad to be paid as compensation for franchise should be computed on earnings on entire system within and without city, percentage was computable on gross earnings of entire system, including line out of city forming integral part of system, etc.—Mobile Light & R. Co. v. City of Mobile, Ala., 75 So. 889.

94. **Telegraph and Telephones** — Res Ipsa Loquitur.—Where one properly using telephone was injured by electric shock, doctrine of res ipsa loquitur applies, although shock might have been caused by electric storm.—Warren v. Missouri & Kansas Telephone Co., Mo., 196 S. W. 1030.

95. **Vendor and Purchaser**—Equity of Redemption.—Vendor of land has in equity a lien for purchase money, though absolute deed has been executed reciting different amount paid as purchase price, good as against vendee or any person purchasing with notice of non-payment. —Lay v. Gaines, Ark., 196 S. W. 919.

96.——Waiver.—If, long after the final installment payment becomes due, the vendor accepts payments on account of interest on the unpaid balance, he waives his right to declare a forfeiture for failure to pay in time without first tendering a deed and putting the vendee in default.—Hermosa Beach Land & Water Co. v. Law Credit Co., Cal., 166 Pac. 22.

97. **Wills**—Annuity.—A clause in a will directing a devisee of lands to pay an annuity for a period of years to a person named therein constitutes a legacy for the benefit of such person.—Dixon v. Helena Society of Free Methodist Church of North America, Okla., 166 Pac. 114.

98.——Contract.—Agreement to leave child's share of estate to one not legally adopted, or to leave all of property to another, held not enforceable, unless agreement, and that it was clear and specific in its terms, are clearly and satisfactorily shown.—Price v. Wallace, U. S. C. C. A., 242 Fed. 221.

99.——Remainderman.—Where a will gave interest in remainder in a bequest to "children of M. V. B., J. M. B., and the four children of W. J. M., H., V., J., V.," the word "children" as designating those of M. V. B., does not refer to children of J. M. B., and J. M. B., being alive, is beneficiary, and not his child or children, although in event of his decease they would take as his heirs.—In re Mays' Estate, Mo., 196 S. W 1039.

100.——Residuary Estate.—Under will giving testatrix's residuary estate to her husband, "his heirs and assigns forever," such words added nothing to estate which he would have taken without them, though they might be considered in construing devise to him.—Tillman v. Ogren, N. Y., 166 N. Y. S. 39.